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Supreme Court of the United States

JOSUE LEOCAL,
Petitioner,

v.

UNITED STATES ATTORNEY GENERAL,
IMMIGRATION AND NATURALIZATION SERVICE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* CITIZENS AND IMMIGRANTS FOR EQUAL JUSTICE, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, NATIONAL COALITION FOR HAITIAN RIGHTS, ALIANZA DOMINICANA, COALITION FOR IMMIGRANTS' RIGHTS AT THE COMMUNITY LEVEL, FAMILIES FOR FREEDOM, KOREAN IMMIGRANT WORKERS ADVOCATES, NEW YORK IMMIGRATION COALITION, AND NORTHERN MANHATTAN COALITION FOR IMMIGRANT RIGHTS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

In 1996, Congress enacted two revisions to the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1101 *et seq.*: the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 ("AEDPA"), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C., 110 Stat. 3009 ("IIRIRA"). Under the new laws, once a conviction is classified as an "aggravated felony," 8 U.S.C. § 1101(a)(43), a host of extreme consequences follow, including mandatory detention, exclusion from eligibility for discretionary relief from removal, denial of eligibility for asylum and withholding of removal, permanent bars to naturalization, permanent bars to readmission, and enhanced criminal penalties of up to twenty years' imprisonment for reentry after deportation.

At issue in this case is the definition of "crime of violence" under 18 U.S.C. § 16, which triggers "aggravated felony" consequences for any noncitizen whose criminal sentence is at least one year—even if the sentence is suspended and the person never serves a day in jail. For the last eight years, the government has sought to impose an expansive definition of the term "crime of violence," and one of the central areas in which it has sought to impose this definition has been the treatment of convictions for driving under the influence of alcohol. At first, the Board of Immigration Appeals accepted this expansive approach, but upon further consideration, it reversed its initial interpretation of the statute. Meanwhile, the federal courts have largely

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* *Amici curiae* state that no party or its counsel has authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel have made any monetary contribution to its preparation. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of the Court.

sided against an expansive application of the term "crime of violence" and the associated consequences that result from categorizing such a crime as an "aggravated felony."

Amici curiae are community organizations whose members or constituencies face the real world consequences of classifying offenses as aggravated felonies. These members and constituents have felt the loss of loved ones due to detention, deportation, and denial of asylum. They have rejoiced with news that courts were rejecting the overly-expansive definitions pursued by the government. Many members and constituents have enjoyed a period of peace in their lives since the courts rejected the government's arguments that driving under the influence convictions should be treated as aggravated felonies. In this case, however, they face the return of the nightmare of removal proceedings with no hope to prove that they deserve to remain with their families in this country. *Amici* respectfully submit this brief to apprise the Court of the real world consequences of labeling convictions as aggravated felonies and the resulting necessity to construe any possible ambiguity in the law against labeling a crime as an aggravated felony.

Citizens and Immigrants for Equal Justice (CIEJ) is a national coalition of over 1,000 families in twenty-nine states whose integrity has been directly threatened by overly-broad interpretations of the aggravated felony classification. Our members are the family members of lawful permanent residents who face deportation. Deportation does incalculable injury to our families, separating parents from children and depriving our family members of essential income and emotional support.

The American-Arab Anti-Discrimination Committee (ADC) is a civil rights organization dedicated to defending the rights of people of Arab descent and promoting their rich cultural heritage. We have 38 active chapters nationwide that

assist the national office in grassroots work and advocacy. ADC works with an immigrant community that has been harshly affected by AEDPA and IIRIRA. Members and families in our community have suffered greatly due to mandatory detentions and deportation under these provisions. These laws have disrupted the lives of families whose members—both U.S. citizens and noncitizens—are productive individuals, have U.S. citizen children, and have strong ties to their communities. A broad definition of what constitutes a crime of violence and therefore an aggravated felony will trigger even harsher penalties for our community members.

The National Coalition for Haitian Rights (NCHR) is a national non-profit organization founded in 1982 and based in New York City. It seeks to promote and protect Haitians' rights under U.S. and international law, and to promote the rule of law and democracy in Haiti. Since its founding, NCHR has participated in litigation and campaigns on behalf of Haitians. NCHR has produced reports on human rights conditions in Haiti that are used by Haitian asylum-seekers, advocates, asylum officers and immigration judges involved in adjudicating claims. Our interest in this case stems from the fact that many beneficiaries of past campaigns have been affected by the criminalization of a civil offense that under current laws mandates deportation to a land that many hardly know or have no ties with. We believe that the law is unjust and that Haitians and other similarly situated individuals deserve to be treated fairly and justly.

Alianza Dominicana (Alianza) is a non-profit community development organization that partners with youth, families and public and private institutions to revitalize economically distressed neighborhoods. Alianza's mission is to assist children, youths, and families in breaking the cycle of poverty and fulfilling their potential as members of the global community. Since its founding 13 years ago, Alianza has emerged

as the most comprehensive Dominican human service and community development agency in the United States. Alianza annually services more than 17,000 individuals from eleven sites in Manhattan and the four other boroughs.

Coalition for Immigrants' Rights at the Community Level (CIRCLE) is dedicated to protecting the rights of immigrants and their families. We provide services to noncitizens including members of the York, Pennsylvania community as well as those in the custody of the ICE (Bureau of Immigration and Customs Enforcement, formerly known as the INS or Immigration and Naturalization Service). Since August 2000, CIRCLE has provided services to over 850 noncitizen clients, including many asylum seekers. Asylum seekers, who have fled persecution in their home country, are an especially vulnerable group and require special attention. Many have been tortured and have lost members of their immediate family. Most of our clients who are held in custody face deportation because of a past crime for which they have already paid a fine, served community service, or in some cases, served prison time.

Families for Freedom is a New York network by and for immigrants facing deportation. All of our members are current or former immigrant prisoners (detainees), their loved ones, or individuals at risk of deportation. We are multiethnic, with constituents coming primarily from Latin America, the Caribbean, and South Asia. Families for Freedom seeks to repeal the laws that are tearing apart our homes and neighborhoods, and to build the power of immigrant communities of color to provide a guiding voice in the growing movement for immigrant rights as human rights.

Korean Immigrant Workers Advocates (KIWA) has been fighting since 1992 to empower low-wage immigrant workers in their workplaces and communities in Los Angeles' Koreatown. KIWA is a community-based workers' center made up of primarily Korean and Latino immigrants. Despite their hard work and contributions to the United States and their home countries, these immigrant families face widespread exploitation. KIWA seeks to organize local workers against employer abuse as well as join in coalitions to implement policies and laws that protect immigrants' human rights.

The New York Immigration Coalition (NYIC) is an umbrella policy and advocacy organization for approximately 150 groups in New York State that work with immigrants and refugees. As the coordinating body for organizations that serve one of the largest and most diverse newcomer populations in the United States, NYIC has become a leading advocate for immigrant communities on the local, state and national levels. NYIC's membership includes grassroots community organizations, not-for-profit health and human services organizations, religious and academic institutions, labor unions, and legal and social and economic justice organizations. NYIC believes that classifying DUI convictions as aggravated felonies will cause great suffering to hardworking immigrant families and communities whose members may face removal.

The Northern Manhattan Coalition for Immigrants Rights (NMCIR) is a non-profit organization founded in 1982 to educate, defend and protect the rights of immigrants. Recognized by the Board of Immigration Appeals, NMCIR is committed to expanding access to legal immigration services, and participating in policy making and community organizing efforts. Some of the services we provide include assisting applicants with citizenship, residency, family-based petitions, detention, and deportation issues.

BACKGROUND

Following passage of IIRIRA in 1996, the government began to argue that DUI[1] offenses should be classified as "crimes of violence" under 18 U.S.C. § 16, and therefore as "aggravated felonies" under 8 U.S.C. § 1101(a)(43)(F). Relying on this argument, the government initiated deportation proceedings against large numbers of lawful permanent residents with DUI convictions and argued that there was no way in which these individuals could obtain any relief from removal. The most well-known government initiative is the infamous "Operation Last Call," in which the government rounded up hundreds of noncitizens in Texas, including long-term lawful permanent residents, with DUI convictions that often were many years old, placed them in detention, and instituted deportation proceedings against them.[2] Many of these immigrants were deported. Others fought their cases through the agency and the courts.

Operation Last Call was widely reported in the press. In October 1998, the *Wall Street Journal* discussed the impact of the government's broad reading of the crime of violence definition for DUI offenses, explaining that the government rounded up and arrested more than 530 noncitizens with DUI convictions across Texas, threatened them with deportation and, in many cases, placed them in deportation proceedings.[3] Instead of notifying individuals and ordering

[1] The terms driving under the influence ("DUI") and driving while intoxicated ("DWI") are used interchangeably in this brief.

[2] *See* Bob Ortega, *Last Call: Texas Agents Spark Outcry in Roundup Of Legal Immigrants—INS Uses Broader Definition Of Felons to Target Old DWI Convictions—Case of a Model Noncitizen*, Wall St. J., Oct. 12, 1998, at A1; David L. Marcus, *Three times and out; some face deportation for repeat drunken driving*, Boston Globe, Oct. 14, 1998, at A1.

[3] *See* Ortega, *supra* note 2, at A1.

them to report to the INS, the government humiliated entire families, arresting individuals without warning at their homes and workplaces, in some cases brandishing revolvers.[4] One of the many victims was Isaias Jauregui:

- Isaias Jauregui, a 48-year-old construction subcontractor in Texas, who immigrated to the United States from Mexico in 1976, was arrested and detained as part of Operation Last Call for a DWI conviction that was six years old. Prior to his arrest, Mr. Jauregui supported his wife, two children, and two grandchildren, all U.S. citizens, as well as provided support to his sister's family. After his last DWI conviction, he entered a rehabilitation program, joined Alcoholics Anonymous, and began working towards a college degree. His family suffered the humiliation of his public arrest and his daughter, Vicki, unable to comprehend why her father was being arrested stated, "He's made an effort. He's changed totally. That's what I don't understand about this."[5]

[4] *See* Marcus, *supra* note 2, at A1 ("On Sept. 3, agents and police brandishing revolvers showed up at Balderrama's adobe house.").

[5] *See* Ortega, *supra* note 2, at A1. Newspapers reported many other similar stories. *See* Ortega, *supra* note 2, at A1 (as part of Operation Last Call, Basilico Bustamante was rounded up, notwithstanding the fact that he was a recovering alcoholic who had two U.S.-born children, had completed a rehabilitation program, attended Alcoholics Anonymous meetings, had started going to school and had stopped drinking three years earlier); Marcus, *supra* note 2, at A1 (David Balderrama, who emigrated to the United States nearly 50 years ago, later became a lawful permanent resident, and had eight children, was caught in the net of Operation Last Call, when the INS raided his home and informed him he would be deported to Mexico); Patty Reinert, *Immigrant ex-cons fight deportation; Hope lies in high-court cases*, Houst. Chron., May 6, 2001, at 1.

At first, the Board of Immigration Appeals accepted the government's arguments for an expansive reading of the term "crime of violence." *See In re Magallanes-Garcia*, 22 I. & N. Dec. 1 (BIA 1998) (concluding that driving while intoxicated "involves a substantial risk of harm to persons and property" and as a result constitutes a crime of violence); *In re Puente-Salazar*, 22 I. & N. Dec. 1006 (BIA 1999) (same). But when the issue was considered on judicial review, the federal courts largely insisted on reading the term more narrowly. In most instances, the courts of appeals have ruled for noncitizens and have found that their DUI convictions did not constitute "crimes of violence" under 18 U.S.C. § 16. *See, e.g.*, *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001); *Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir.), *amended*, 262 F.3d 479 (5th Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001). *But see Le v. U.S. Att'y Gen.*, 196 F.3d 1352 (11th Cir. 1999); *Omar v. INS*, 298 F.3d 710 (8th Cir. 2002). Subsequently, the BIA reconsidered *Puente-Salazar* and changed its position, holding that it would follow the law of the circuits that had addressed whether a DUI is a crime of violence for cases falling within their respective jurisdictions, and would follow the majority position when addressing the question in those circuits that had not yet ruled on the issue. *See In re Ramos*, 23 I. & N. Dec. 336, 345-47 (BIA 2002).

Caught in the middle of this legal debate have been long-term immigrants with strong ties to this country and compelling equities. Some face future removal proceedings. Others have suffered through detention and currently are protected from removal under court decisions that reject the government's broad reading of the crime of violence definition. Still others have already been deported. The legal back and forth regarding whether a DUI constitutes an aggravated felony has caused tremendous disruption to the lives of numerous noncitizens convicted of the offense as well as their family members.

The following examples are illustrative of the effects of the government's efforts to impose a broad reading of the aggravated felony classification on the lives of numerous noncitizens and their families:

- Felicien Cyubahiro, a 54-year-old Tutsi refugee from Rwanda, is a devout Roman Catholic who escaped the genocide of Rwanda in 1994 and later settled in Kansas City, Missouri. Tragically, Mr. Cyubahiro was haunted by the memories of the horror he had faced in Rwanda—including the killing of his wife, children, friends and neighbors—and turned to drinking. Between 1995 and 1998, he was convicted of three DWI offenses. After the last conviction, Mr. Cyubahiro entered counseling, started taking medication for the depression stemming from the tragic losses he had suffered and gave up drinking. Working hard to put his life back on track, he eventually became engaged to an American woman. However, based on the government's expansive reading of the term "crime of violence," the INS arrested Mr. Cyubahiro, detained him for about a year in an INS processing center in El Paso, Texas, far away from family and friends, and instituted deportation proceedings against him. Mr. Cyubahiro was scheduled for deportation to Rwanda, but ultimately was spared deportation due to the Fifth Circuit's ruling in *Chapa-Garza*. He has since gotten married and has recovered from his alcoholism.[6]

[6] *See* Oscar Avila, *Immigrant's missteps may deny him his dream*, Kan. City Star, Apr. 22, 2000, at A1; Telephone Interview by Saira Rao with Judy Cyubahiro, Mr. Cyubahiro's wife (Apr. 28, 2004).

- Mario Tobias had been a legal permanent resident of the United States for 25 years when he was deported to Mexico in 1999 after his 1994 DUI conviction was retroactively deemed an aggravated felony. He was forced to leave behind a wife and three children. Since Mr. Tobias' deportation, his young children have become depressed, angry, and have had difficulties at school and at home. Mr. Tobias' wife has struggled to support the family by herself, despite moving the family to a less expensive apartment. Mr. Tobias has sought to rejoin his family based on the Fifth Circuit's ruling in *Chapa-Garza*.[7]
- Andres Girosky-Garibay immigrated to the United States from Mexico and became a lawful permanent resident in 1982.[8] In 1998, he was convicted of a DWI. Mr. Girosky-Garibay married a U.S. citizen and helped raise her five children, all of whom are U.S. citizens. His mother was a lawful permanent resident and he had six brothers and sisters who were legal residents of the United States. Moreover, Mr. Girosky-Garibay successfully completed a sub-

[7] *See* Motion to Reopen and Reconsider and to Vacate Order of Removal at 1-2 (Immigration Court, Dallas, TX Apr. 17, 2001); Affidavit of Maria Tobias (Immigration Court, Dallas, TX Apr. 17, 2001); Letter and Translation of Letter from Maria Tobias (Immigration Court, Dallas, TX Apr. 17, 2001). In a letter dated May 6, 2004, *amici* alerted the Clerk of the Court that this brief would refer to several documents which are not readily available on the Internet or in electronic databases. These documents are the types of materials of which the Court may take judicial notice, but in order to avoid any inconvenience to the Court, *amici* have not sought permission to lodge these materials with the Clerk of the Court at this time. As stated in the letter, *amici* are prepared to lodge copies of these material should the Court wish to review them.

[8] *See United States v. Girosky-Garibay*, 176 F. Supp. 2d 705, 707 (W.D. Tex. 2001).

stance abuse program.[9] However, in 1998, the INS initiated removal proceedings against him based on his DWI conviction. An immigration judge found that Mr. Girosky-Garibay's DWI conviction was a crime of violence and ordered him removed from the United States.[10] The judge further ruled that, because Mr. Girosky-Garibay had been convicted of an aggravated felony, he was not eligible for cancellation of removal pursuant to 8 U.S.C. § 1229b(a). Mr. Girosky-Garibay was deported in January 2000.[11]

- Touch Rin Svay, a 23-year-old Cambodian national, born in a refugee camp on the border of Cambodia and Thailand, immigrated to the United States when he was five years old with his mother, father and younger sister Sary. After graduating high school in Portland Maine, Mr. Svay joined the U.S. Marine Corps. In 2002, Mr. Svay was convicted of driving while intoxicated and vehicular assault and manslaughter when he caused an automobile crash while home on leave that resulted in the death of his sister. Despite the seriousness of the offense, the sentencing judge stated on the record that he felt that deportation would "trouble me greatly," but felt that a sentence of less than a year would not be appropri-

[9] *Id.* at 714.

[10] *Id.* at 707.

[11] Mr. Girosky-Garibay later illegally reentered the United States and the government prosecuted him, seeking a penalty enhancement based on his DWI conviction. In removal proceedings filed pursuant to this reentry, Mr. Girosky-Garibay challenged the legality of his original order of removal based on the Fifth Circuit's ruling in *Chapa-Garza*. The district court found in Mr. Girosky-Garibay's favor. *Id.* at 708. In so doing, the court specifically noted that, based on his family ties, Mr. Girosky-Garibay was reasonably likely to have been granted cancellation of removal had his DWI not initially been deemed to bar him from such relief. *Id.* at 714.

ate. Because the United States has recently signed a repatriation agreement with Cambodia, Mr. Svay will face deportation proceedings following his prison term. If his crime is deemed an "aggravated felony," no judge will be able to consider the pleas of his parents, both refugees from Cambodian genocide, who have lost their daughter and now face the loss of their son. No judge will be able to consider the fact of Mr. Svay's service in the armed forces, the circumstances of the crime, or what it would mean to Mr. Svay to be deported to a country in which he has never lived and from which his family escaped.[12]

Even for those individuals who have ultimately been able to return to the United States after having been deported, their families have suffered immensely from the disruption caused by their loved one's deportation.

- Hugh Morgan emigrated from Ireland to the United States as a young child and became a lawful permanent resident at the age of six in 1969. In March 1999, he was convicted of driving while intoxicated. Mr. Morgan was deported to Ireland shortly prior to the Second Circuit's ruling that driving under the influence is not a crime of violence. For a year, he lived in Ireland where he was treated as a foreigner and ostracized. During that period, he was also separated from his son Sean, who was his pride

[12] *See* Josie Huang, *Cambodians fear worst for deportees; Community leaders believe stigma and culture shock await individuals forced to leave their only home since childhood*, Portland Press Herald, May 25, 2002 at 1A; Seth Mydans, *Dead End for Cambodians Who Grew So American*, N.Y. Times, Aug. 9, 2002, at A3; *State v. Touch Rin Svay*, No. SRP-02-279 (Me. July 21, 2003), *available at* http://www.courts.state.me.us/opinions/2003%20documents/03me93sv.htm.

and joy. Sean, a U.S.-born citizen, suffered horribly from the separation from his father—he began to have problems at school where his grades slipped dramatically and he got into fights with his peers, his relationship with his mother deteriorated, and he turned into a sullen, withdrawn and moody child. When Mr. Morgan's removal order was vacated by the BIA, he was able to return to the United States and his family. After being reunited with his father, Sean was once again a youthful exuberant child, his grades greatly improved and his problems with his peers at school vanished.[13]

Some of the noncitizens facing deportation proceedings subsequent to DUI convictions, while having been detained for years, ultimately were permitted to remain in the United States as a result of court of appeals decisions such as *Chapa-Garza*. Many of these individuals have been living productive lives and have deepened their ties to the United States in the past few years. If the Court now rules that DUI offenses are crimes of violence and therefore aggravated felonies, these noncitizens will again face the prospect of deportation to countries they may not remember and where they may not speak the language, as well as painful separations from their family members and communities.

[13] *See* Declaration of Hugh R. Morgan, *Morgan v. INS* (2d Cir. Apr. 27, 2002) (No. 00-4188); Declaration of Christine Palacio, *Morgan v. INS* (2d Cir. Apr. 25, 2002) (No. 00-4188); Stipulation and Order of Dismissal, *Morgan v. INS* (2d Cir. May 22, 2002) (No. 00-4188). *Amici* are prepared to lodge copies of these material should the Court wish to review them. *See supra* note 7.

SUMMARY OF ARGUMENT

Amici know first-hand that defining a criminal offense as an "aggravated felony" imposes extremely harsh consequences on noncitizens under the federal immigration and criminal laws by rendering noncitizens (1) ineligible for numerous forms of relief from removal, (2) ineligible for asylum, (3) ineligible for naturalization, (4) subject to mandatory detention, and (5) ineligible to ever reenter the United States and subject to harsh criminal penalties for doing so. (*Point I.*) In light of these tremendously severe consequences—which arguably make the "aggravated felony" category the most severe classification ever to exist under the immigration laws—*amici* respectfully submit that should the Court find any ambiguity in the language of 18 U.S.C. § 16, the Court should apply the longstanding-principle of lenity in the interpretation of immigration statutes to hold that a DUI offense does not constitute an "aggravated felony." (*Point II.*)

ARGUMENT

I. DEFINING A CRIMINAL OFFENSE AS A "CRIME OF VIOLENCE," AND THEREFORE AN "AGGRAVATED FELONY," IMPOSES EXTREMELY HARSH CONSEQUENCES ON LAWFUL PERMANENT RESIDENTS WHO ARE PRODUCTIVE, ROOTED MEMBERS OF AMERICAN SOCIETY, AND ON OTHER NONCITIZENS WITH COMPELLING REASONS FOR MAINTAINING U.S. RESIDENCY

The classification of a criminal offense as an "aggravated felony" triggers many of the harshest consequences possible under the federal immigration laws for noncitizens convicted of such offenses, perhaps rendering it the most severe immigration classification ever enacted. These consequences include (1) absolute bars on an immigration judge's ability to exercise discretionary authority to permit a noncitizen to remain in the country (*i.e.*, to consider equitable factors such as length of U.S. residence, gainful employment, hardship to family members in the United States, and completion of rehabilitation programs); (2) ineligibility for asylum; (3) permanent bars to citizenship, even for convictions that pre-date changes in the law; (4) mandatory detention; and (5) imprisonment of up to twenty years for reentry into the United States subsequent to deportation.

A. Noncitizens Convicted Of An Aggravated Felony Are Ineligible For Discretionary Relief From Removal

In recognition of the far-reaching consequences of immigration decisions, the immigration laws have long included several provisions that empower judges to grant discretionary relief from removal to otherwise deportable or inadmissible noncitizens, based on their individual circumstances and equities. *See, e.g.*, 8 U.S.C. §§ 1229b, 1229c (authorizing various forms of discretionary relief). However, noncitizens convicted of an aggravated felony are categorically ineligible for the vast majority of these forms of discretionary relief.

1. Cancellation Of Removal

The immigration laws permit an immigration judge to cancel the removal of a noncitizen who is deportable or inadmissible when certain circumstances are met. Lawful permanent residents are eligible for cancellation of removal if they (1) have been lawfully admitted as permanent residents for at least five years and (2) have spent seven continuous years as U.S. residents in "any status." 8 U.S.C. § 1229b(a). Winning cancellation of removal depends heavily on the noncitizen's ability to present sufficient positive equities, including family ties, length of

time in the United States, hardship should deportation occur, service in this country's armed forces, employment history, property or business ties, evidence of value and service to the community, proof of genuine rehabilitation, and other evidence of good character, such as affidavits from family, friends, and community representatives. *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998).

Cancellation of removal also is available for nonpermanent residents who can show (1) ten years of continuous physical presence in the United States, (2) extreme and unusual hardship to a U.S. citizen or lawful permanent resident spouse, parent or child if the nonpermanent resident is removed, and (3) good moral character. 8 U.S.C. § 1229b(b). However, both lawful permanent residents and nonpermanent resident noncitizens are statutorily barred from obtaining cancellation of removal, without regard to their individual circumstances, if they have been convicted of an aggravated felony.[14] 8 U.S.C. § 1229b(a)(3) & (b)(1)(C). Such was the case for Mr. Girosky-Garibay, *see supra* pp. 10-11 & n.11, who was found ineligible to apply for cancellation of removal notwithstanding his strong family ties in the United States.

Thus, if a noncitizen's DUI-related offense is deemed to be an aggravated felony, an immigration judge is statutorily barred from considering equitable factors that otherwise could and would be considered, including:

[14] Similarly, a lawful permanent resident who has been convicted of an aggravated felony is statutorily barred from seeking a family hardship waiver under 8 U.S.C. § 1182(h), which permits discretionary relief from inadmissibility if denial of admission would result in extreme hardship to a spouse, parent, son, or daughter who is a U.S. citizen or lawful permanent resident. *See Yeung v. INS*, 76 F.3d 337, 340 (11th Cir. 1996). Applications for relief under § 1182(h) are adjudicated with reference to the same discretionary factors that are considered for cancellation of removal. *See In re Mendez-Moralez*, 21 I. & N. Dec. 296, 299-302 (BIA 1996).

- the dramatic psychological and financial impact that the deportation of a parent has on a child and other family members—as in the case of Mario Tobias, Isaias Jauregui, and Hugh Morgan;
- the fact that a noncitizen has entered a rehabilitation program, stopped drinking and in many cases has completely rehabilitated—as in the case of Isaias Jauregui, Basilio Bustmamente, and Felicien Cyubahiro;
- the length of a noncitizen's residency in the United States and the lack of any meaningful ties to the noncitizen's home country—as in the case of David Balderrama (nearly fifty years residency), Hugh Morgan, (over thirty years residency), Mario Tobias (twenty-five years residency), and Touch Rin Svay (over fifteen years residency in the United States and at no time lived in Cambodia to where he would be deported);
- service in the U.S. Armed Forces, as in the case of Touch Rin Svay; and
- the hardship of deporting a person to a country from which the immigrant or the immigrant's family escaped genocide, as in the case of Felicien Cyubahiro from Rwanda and Touch Rin Svay from Cambodia.

2. Voluntary Departure

Under the INA, the government may grant a noncitizen the discretionary relief of voluntarily departing the United States at the noncitizen's expense, in lieu of being subject to an order of removal. *See* 8 U.S.C. § 1229c(a)(1). This form of relief is valuable not only because it enables noncitizens to avoid the stigma and harassment of removal

proceedings and to depart to a country other than their native one (*e.g.*, to avoid persecution), but also because it allows noncitizens to escape certain statutory bars that preclude admission for several years following removal—thus preserving their ability to return legally to the United States in the future. However, immigration judges are statutorily precluded from considering granting voluntary departure relief to a noncitizen who has been convicted of an aggravated felony. *See* 8 U.S.C. § 1229c(b)(1)(C).

3. Expedited Removal

Certain individuals convicted of an aggravated felony may also be placed in expedited removal proceedings under 8 U.S.C. § 1228, in which they never even see an immigration judge. If a noncitizen is placed in such a proceeding, that individual may become ineligible for *all* forms of discretionary relief. *See* 8 U.S.C. § 1228(b)(5) (barring eligibility for any form of discretionary relief for individuals in expedited removal proceedings). Therefore, a noncitizen convicted of a DUI that is classified as a "crime of violence," and thus an "aggravated felony," would be deprived of significant discretionary protections which that individual otherwise would be afforded if his DUI offense were not deemed a "crime of violence."

B. Refugees Convicted Of An Aggravated Felony Are Ineligible For Asylum And Withholding Of Removal

Individuals who have suffered past persecution or who face a well-founded fear of future persecution in their home countries are eligible for various forms of relief in the United States, including asylum. But such persons who also are convicted of a "particularly serious crime" are statutorily barred from eligibility for many of these forms of relief and may in fact have such forms of relief revoked based on their convictions.

First, individuals convicted of an offense deemed to be a "particularly serious crime" are categorically precluded from obtaining asylum in the United States. 8 U.S.C. §1158(b)(2)(A)(ii). An individual convicted of an "aggravated felony" is automatically deemed to have been convicted of a "particularly serious crime," and therefore is statutorily barred from obtaining asylum. 8 U.S.C. §1158(b)(2)(B)(i). Thus, if DUI offenses were treated as "aggravated felonies," then asylum officers and immigration judges would lack any discretion whatsoever to grant asylum status to refugees convicted of this crime, no matter how compelling the refugee's situation or how great the danger of persecution the refugee would face if returned to his or her home country.[15]

Moreover, even a refugee who already has been granted asylum in the United States is subject to termination of his or her asylum status, and to removal, if convicted of a "particularly serious crime" including, for the reasons described above, a DUI deemed an aggravated felony. 8 U.S.C. § 1158(b)(2)(B)(i), (c)(2)(B) & (c)(3).

Finally, depending on the length of the sentence he or she receives, a refugee or asylee who is convicted of an aggravated felony could be barred from obtaining withholding of removal relief under 8 U.S.C. § 1231(b)(3) based on his or her previously-established fear of persecution in the country to which he or she would be removed. *See*

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[15] By contrast, if DUI offenses are not categorically defined to constitute an aggravated felony, then an immigration judge evaluating the case of an individual convicted of a particularly heinous DUI may still deem that individual's offense to be a "particularly serious crime" and deny asylum—so failure to classify all DUI offenses as aggravated felonies does not automatically result in all DUI offenders being eligible for asylum.

8 U.S.C. § 1231(b)(3)(B)(ii).[16] This result is possible because withholding of removal relief is unavailable to individuals convicted of a "particularly serious crime" which, for withholding of removal purposes, automatically includes a conviction of an aggravated felony with an aggregate sentence of at least five years. 8 U.S.C. §1231(b)(3)(B)(ii).

Thus, refugees such as Felicien Cyubahiro, *see supra* p.9, who have fled persecution in their home country, including the killing of family members, and who have a well-founded fear of persecution if returned to their home country, could (1) be barred from obtaining asylum; (2) have any asylum grant terminated; and (3) be ineligible for withholding of removal.

C. Noncitizens Convicted Of An Aggravated Felony Are Ineligible For Naturalization

In order to naturalize and become a U.S. citizen, a noncitizen ordinarily must establish, among other things, that he or she has been a person of "good moral character" during certain specified periods of time before applying to naturalize and has continued to be of good moral character while the naturalization application is pending. *E.g.*, 8 U.S.C. § 1427(a)(3). However, a noncitizen convicted of an aggravated felony after November 29, 1990 may be permanently barred from naturalization, since the 1990 amendments to the INA preclude an individual "who at *any time* has been convicted of an aggravated felony" from establishing good moral character. 8 U.S.C. § 1101(f)(8)

[16] The INA provides generally that "[n]otwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

(emphasis added); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, § 509(b) (bar to establishing good moral character applies to aggravated felony convictions "occurring on or after" date of enactment). Because the 1996 expansions of the aggravated felony definition are applied retroactively, convictions that fall within the amended aggravated felony definition serve to bar citizenship for many lawful permanent residents who pled guilty to their offenses before the law changed in 1996—including individuals who may have been granted discretionary relief from removal prior to the enactment of AEDPA and IIRIRA.

D. Noncitizens Convicted Of An Aggravated Felony Are Subject To Mandatory Detention While Removal Proceedings Are Pending

Under 8 U.S.C. § 1226(c), any noncitizen convicted of an aggravated felony is subject to mandatory detention while removal proceedings are pending, without any individualized determination that such detention protects against danger and flight risk. *See generally Demore v. Kim*, 538 U.S. 510 (2003). In contrast, when the conviction does not trigger mandatory dentition, the noncitizen can present evidence that he or she is not a danger or a flight risk. Mandatory detention disrupts every aspect of a person's life, tearing individuals away from their families, preventing them from working, running businesses, and attending school, and subjecting them to onerous prison conditions. Although immigration proceedings are civil, those noncitizens who have been subject to mandatory detention, such as Felicien Cyubahiro and Isaias Jauregui, have suffered a total loss of liberty.

E. Noncitizens Convicted Of An Aggravated Felony Face Enhanced Barriers To Reentry And Draconian Penalties For Reentry Or Attempted Reentry To The United States

Generally, noncitizens convicted of aggravated felonies are forever precluded from reentering the United States following their removal. *See* 8 U.S.C. § 1182(a)(9)(A)(i) (providing that "[a]ny alien who has been ordered removed under section 1225(b)(1) of this title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission . . . at any time in the case of an alien convicted of an aggravated felony" is inadmissible). This general rule is subject to an exceedingly narrow exception, under which the Attorney General may grant advance consent to apply for readmission. *See* 8 U.S.C. § 1182(a)(9)(A)(iii) ("Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission."). Thus, once an offense is classified as an aggravated felony it serves as a bar to reentering the United States, regardless of the individual's personal and familial ties to the United States.

Moreover, a noncitizen who enters or attempts to reenter the United States after being removed subsequent to an aggravated felony conviction, regardless of the reasons for the individual's reentry, faces draconian criminal penalties, which are much more severe than those imposed on other individuals who have been deported but who reenter or attempt to reenter the United States. In particular, a noncitizen whose conviction for criminal reentry "was subsequent to a conviction for commission of an aggravated felony" are subject to a prison sentence of up to twenty years. 8 U.S.C. § 1326(b)(2).

Hence, if the Court decides that a DUI offense is a crime of violence, defendants like Andres Girosky-Garibay[17] or defendants similarly situated to those in *United States v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004), *cert. denied*, 124 S. Ct. 1728 (2004); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001); *United States v. Trinidad Lucio-Lucio*, 347 F.3d 1202 (10th Cir. 2003), will face enhanced sentences of up to twenty years.

II. ANY AMBIGUITIES IN 18 U.S.C. § 16 SHOULD BE CONSTRUED NARROWLY IN FAVOR OF THE NONCITIZEN

Amici first and foremost advance that there is no ambiguity in the plain language of 18 U.S.C. § 16 and that the Florida DUI statute at issue in this case does not meet the definition of a crime of violence. *See, e.g*, *Dalton v. Ashcroft*, 257 F.3d 200, 207-08 (2d Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 609-11 (7th Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir. 2001). However, should the Court conclude that 18 U.S.C. § 16 is ambiguous in any way, all such ambiguities should be construed in favor of the noncitizen, given the tremendously harsh consequences faced by individuals with aggravated felony convictions. Such an interpretation is warranted in light of the "longstanding principle" that this Court has recognized of "'construing any lingering ambiguities in deportation statutes in favor of the alien.'" *INS v. St. Cyr*,

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[17] The government could have requested a penalty enhancement based on an aggravated felony conviction stemming from Mr. Girosky-Garibay's DWI conviction, but instead based the penalty enhancement request on a felony offense of DWI. *United States v. Girosky-Garibay*, 176 F. Supp. 2d 705, 708 n.5 (W.D. Tex. 2001).

533 U.S. 289, 320 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

This principle of lenity in the interpretation of deportation statutes recognizes the harsh consequences that result from deportation. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (resolving statutory ambiguities in favor of noncitizen "because deportation is a drastic measure and at times the equivalent of banishment or exile"); *see also Barber v. Gonzales*, 347 U.S. 637, 642 (1954) ("[D]eportation statutes as a practical matter may inflict 'the equivalent of banishment or exile'"). As the Court repeatedly has recognized, the "stakes are indeed high and momentous for the alien who has acquired his residence here." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). Indeed, those "stakes" are particularly "weighty" where, as here, the noncitizen is a long-time legal permanent resident who stands to "lose the right to . . . [live with his] immediate family, a right that ranks high among the interests of the individual." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *see also Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[D]eportation may result in the loss 'of all that makes life worth living.'" (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

In the criminal context, this Court long has embraced a similar rule, noting that "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83 (1955); *see also Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). Indeed, to the extent that individuals with aggravated felony convictions potentially face serious criminal and sentencing consequences outside the deportation context, such as the enhanced penalties for illegal reentry discussed above, the criminal rule of lenity offers further support for a strict construction of 18 U.S.C. § 16 . *Cf. United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 & n.10 (1992) (in civil action, criminal rule of lenity applies when construing ambiguous statute that "has criminal applications").

A limiting construction of the aggravated felony definition that favors the noncitizen is justified "not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct." *Bell*, 349 U.S. at 83. Rather, lenity in the interpretation of deportation statutes "promote[s] fair notice," "minimize[s] the risk of selective or arbitrary enforcement," and "maintain[s] the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). As the Second Circuit emphasized in holding that a DUI conviction under New York law does not satisfy the requirements of 18 U.S.C. § 16:

> [N]othing in our decision today in any way underestimates the toll that drunk driving has taken on human life . . . . But by shoehorning such reprehensible conduct into criminal statutes that were not designed to hold it, we risk an equivalent harm of usurping federal and state legislative roles.

Dalton v. Ashcroft, 257 F.3d 200, 208 (2d Cir. 2001) (citing *Fong Haw Tan*, 333 U.S. at 10); *see also Bonetti v. Rogers*, 356 U.S. 691, 699 (1958) (citing *Bell* to quash an order of deportation based on petitioner's prior membership in the Communist party); *Fong Haw Tan*, 333 U.S. at 10 ("[W]e will not assume that Congress meant to trench on [an immigrant's] freedom beyond that which is required by the narrowest of several possible meanings of the words used.").

Long before Congress created the "aggravated felony" category and designated the array of immigration consequences discussed above, this Court interpreted similar statutory provisions in the immigration laws narrowly when their application would visit punitive immigration consequences upon noncitizens. For example, in *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948), the petitioner had been sentenced to life imprisonment for having murdered two persons. Section 19(a) of the Immigration Act of February 5, 1917, 8 U.S.C. § 155(a), provided in relevant part that "an alien 'who is sentenced more than once' to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude . . . shall be deported." *Fong Haw Tan*, 333 U.S. at 7 (quoting 8 U.S.C. § 155(a)). The petitioner was declared deportable during his imprisonment and, once paroled, was taken into custody by the INS pending deportation. *Id.* at 8. Facing the question whether the sentence of life imprisonment for two counts of murder meant that the petitioner had been "sentenced more than once" within the meaning of the statute, the Court unanimously reversed the order of deportation. The Court concluded that "because deportation is a drastic measure and at times the equivalent of banishment or exile," doubts concerning an immigration statute's interpretation should be resolved in favor of the construction that favors the noncitizen as the "narrowest of several possible meanings of the words used." *Id.* at 10, 28; *accord INS v. Errico*, 385 U.S. 214, 225 (1966).

Since *Fong Haw Tan*, other decisions by this Court have reaffirmed and elaborated upon the basis for narrowly interpreting statutes that carry harsh immigration consequences. For example, in *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court held that a noncitizen could not be precluded retroactively under provisions of AEDPA and IIRIRA from applying for discretionary relief from deportation "because noncitizens

cannot vote" and are therefore "particularly vulnerable to adverse legislation." *Id.* at 315 n.39. In *INS v. Errico*, the Court recognized that the rule of lenity may have special utility where it results in an interpretation of an underlying statute that is consistent with that statute's "humanitarian purpose." 385 U.S. at 225 (interpreting INA provision saving from deportation under certain conditions noncitizens who obtained entry through misrepresentation). Even where the statute being interpreted was intended to penalize noncitizens for engaging in reprehensible conduct, the Court has held that the rule of lenity applies to prevent categorical interpretations of a statute from resulting in the disproportionately harsh punishment of noncitizens who technically would be covered by the statute if the narrowing construction were not used. *See Costello v. INS*, 376 U.S. 120, 130-31 (1964) (INA § 241(a)(4) does not support deportation of immigrants naturalized at the time of their convictions who later become denaturalized, in part because such persons would include those whose original naturalization was legally invalid on technical grounds rather than due to their own misrepresentation).

In light of the litany of especially harsh consequences described and illustrated above that result from an "aggravated felony" conviction, the Court should construe any possible ambiguity in the definition of a crime of violence against treating DUI offenses as aggravated felonies. Application of the rule of lenity helps assure that Congress carefully determines the conduct constituting aggravated felonies in light of the devastating consequences that conviction for such offenses imposes on noncitizens and their families.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the court of appeals should be reversed.

Respectfully submitted,

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